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Nos. 06-1399 & 06-1511

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IN THE

Supreme Court of the United States

NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, *et al.*,

Petitioners,

-and-

JOHNSTON COUNTY BOARD OF EDUCATION,

Petitioner,

v.

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, and NICOLE RIPELLINO,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petitions, where the North Carolina Supreme Court, in affirming the North Carolina Court of Appeals, found Respondents' complaint met the legal requirements necessary for pleading due process and equal protection violations under 42 U.S.C. § 1983.

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Respondents, Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino, oppose the two Petitions for a Writ of Certiorari to review the judgment of the North Carolina Supreme Court.

STATEMENT OF THE CASE

Respondents adopt and incorporate by reference the statement of the case that is set forth in the Petitions for Writs of Certiorari. However, it is respectfully submitted that the North Carolina Supreme Court's decision should be upheld because Respondents' complaint adequately states federal constitutional claims for due process and equal protection under 42 U.S.C. § 1983.

REASONS FOR DENYING THE PETITIONS

I. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT, IN AFFIRMING THE COURT OF APPEALS, PROPERLY CONCLUDED THE RESPONDENTS' COMPLAINT STATES THE REQUIREMENTS NECESSARY FOR A PROCEDURAL DUE PROCESS VIOLATION BY ASSERTING A PROPERTY INTEREST THAT HAS BEEN INTERFERED WITH BY THE LOCAL SCHOOL BOARD.

Initially, it is important to note that Fourth Circuit and North Carolina case law supports the premise that a local board of education is not an "arm of the State." *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 226 (4th Cir. 2001); *Turner v. Gastonia City Bd. of Educ.*, 109 S.E.2d 211 (N.C. 1959); *Meyer v. Walls*, 489 S.E.2d 880 (N.C. 1997).

Petitioners claim that the Johnston County Board of Education is an "arm of the State," and as such, it has immunity. However, the Fourth Circuit Court of Appeals definitively held in *Cash v. Granville County Bd. of Educ.* that a local board of education is a "person" within the meaning of Section 1983 and is capable of being sued for monetary damages. 242 F.3d 219, 226 (4th Cir. 2001). Respondents state this in paragraph 44 of their complaint, by stating that all Petitioners are "persons" under 42 U.S.C. § 1983 and were acting "under the color of state law," being N.C. Gen. Stat. § 115C-142 and other applicable North Carolina statutes. (Petr.'s App. 97.)

As Petitioners correctly note, this Court has recognized a procedural due process violation when the State or an entity acting "under the color of state law" does not follow appropriate procedures in interfering with an individual's life, liberty, or property interest. *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *See generally Matthews v. Eldridge*, 424 U.S. 319 (1976). Respondents meet this test by asserting a property interest in a benefit that has been interfered with by Petitioners, acting under the color of state statute, N.C. Gen. Stat. § 115C (2007).

In order to assert a property interest, needed for a due process violation under 42 U.S.C. § 1983, a Plaintiff must show that he has a "legitimate claim of entitlement" to a benefit; this benefit may be provided by state law. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Respondents' claim of entitlement comes directly from the North Carolina General Statutes. N.C. Gen. Stat. § 115C-43 provides that:

> [T]he local board of education shall have adopted, and made available for public inspection, uniform

> standards under which claims made, civil judgments entered, or criminal charges against members or employees or former members and employees shall be defended or paid.

N.C. Gen. Stat. § 115C-43(c)(ii) (2007). This state statute specifically gives Respondents an entitlement to uniform, published standards set forth by the School Board, which detail how claims will be defended and paid.

Petitioners admit that in the past they have paid injured individuals for both their property and tort damages, and they have used no uniform standards or guidelines to govern which claims they pay. (*Ripellino I* R. Ex. 10, 66, 84-85.) Here, they arbitrarily decided only to pay Respondents $2,153.18 for the Ripellinos' property damage, and assert immunity as to their tort damages.

Petitioners claim that Respondents do not have a "legitimate claim of entitlement" to have their tort claim paid; however this misstates the entitlement that Respondents assert. Through § 115C-43(c), Respondents assert an entitlement to have their tort claim considered under uniform standards, and thereafter a jury trial if necessary, and this "legitimate claim of entitlement" gives Respondents a property interest.

Since Petitioners admittedly have no uniform guidelines detailing how claims will be evaluated, defended and paid, Respondents' property interest in a uniform review of claims has been interfered with by Petitioners. Respondents clearly allege this violation in their complaint. Paragraphs 45-49 of Respondents' complaint specifically describe how Petitioners arbitrarily and intentionally vested absolute discretion in local school board officials regarding the payment and defense of

claims. (Petr.'s App. 97-98.) In fact, it is undisputed that the Board, at its discretion, raises the immunity defense and pays claims without following any published uniform standards, in violation of N.C. Gen. Stat. § 115C-43(c). (Petr.'s App. 107-08, 121; *Ripellino I* R Ex. 10, 66.)

Petitioners voluntarily paid the Respondents $2,153.18 for their property damage claim, but asserted immunity for the remaining injury claim, and refused to pay medical expenses and other compensation. Petitioners' decision to not pay Respondents' entire claim was not made after consulting uniform guidelines required by state law because as stated above, Petitioners have no uniform guidelines. As a result, Petitioners' refusal of payment violated Respondents' procedural due process rights because Petitioners did not follow the proper legal procedure required for the payment and defense of claims.

Petitioners claim that Respondents do not and cannot have a property interest that was interfered with because the Board used absolute discretion in denying payment of Respondents' tort claim. This Court has said that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion;" however, the only reason Petitioners act with "absolute discretion" is because they continue to violate state law in their handling of claims. *Town of Castle Rock*, 545 U.S. at 756. N.C. Gen. Stat. § 115C-43(c)(ii) requires the Board to have public, uniform standards for the defense and payment of claims, and these standards take away Petitioners' discretion in paying and defending claims. Therefore, Petitioners would not have absolute discretion if they had complied with state law. As such, it is respectfully submitted that this Court should not condone violations of state law by finding that Respondents have no "entitlement" as a result of the Board's absolute discretion.

The Respondents' procedural due process violation has been and continues to be compounded by the denial of a jury trial. Under state law, Respondents have a fundamental right to a jury trial. *In re Will of Buck*, 516 S.E.2d 858, 861 (N.C. 1999). This right has been denied over and over again by Petitioners, starting with the initial denial of the tort claim, followed by the motion for bifurcation, two repetitive appeals to the N.C. Court of Appeals, an unsuccessful appeal to the North Carolina Supreme Court, and now the filing of two Petitions before this Court. These appeals have denied Respondents their right to be heard, which according to this Court, is the heart of the Due Process Clause. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Therefore, not only did Petitioners deny Respondents proper process in deciding whether to pay their tort claim, they also continue to violate Respondents' right to due process by denying them their requested jury trial.

II. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT, IN AFFIRMING THE COURT OF APPEALS, PROPERLY FOUND THE RESPONDENTS' COMPLAINT CONTAINS THE REQUIREMENTS NECESSARY FOR A SUBSTANTIVE DUE PROCESS VIOLATION BY ASSERTING A FUNDAMENTAL INTEREST.

This Court has stated that for substantive due process claims, when a fundamental right has been interfered with by the state, the state's conduct is subject to strict scrutiny judicial review. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (citing *Reno v. Flores*, 507 U.S. 292, 301-02 (1993)); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S.

621, 627 (1969) (stating that a state statute that grants some people the right to vote but denies others must be related to a compelling state interest). However, if a non-fundamental interest is asserted, then for a substantive due process violation to exist, the conduct must not be rationally related to a legitimate state interest. *Glucksberg*, 521 U.S. at 719-20.

As stated previously, Respondents' property interest that has been violated is their entitlement to have their tort claim reviewed under published, uniform standards, as required by state statute. Petitioners interfered with this interest by using "absolute discretion" in determining whether Respondents' tort claim should be paid, instead of applying the uniform standards as required by N.C. Gen. Stat. § 115C-43(c)(ii). Respondents clearly detailed Petitioners' arbitrary and intentional use of "absolute discretion" in paragraphs 45-49 of their complaint. (Petr.'s App. 97-98.)

Petitioners' interference violated Respondents' substantive due process because their use of "absolute discretion" is not rationally related to a legitimate state interest. In exercising "absolute discretion" in defending and paying claims, Petitioners violated § 115C-43(c)(ii), which requires published, uniform standards regarding the handling of claims by school boards. Petitioners have no standards or guidelines which they follow. (*Ripellino I* R Ex. 10, 66.)

The State of North Carolina saw it necessary to create a law requiring uniform standards for the defense and payment of local school board claims; therefore, Petitioners' lack of uniform standards, in violation of § 115C-43(c)(ii), is not and cannot be rationally related to a legitimate state interest. The North Carolina legislature would not have felt the need to

implement a statute if "absolute discretion" furthered a legitimate state interest.

In addition, Respondents have a fundamental right to a jury trial for their tort claim, which Petitioners have tried to destroy through their tortured use of the terms "absolute discretion." *In re Will of Buck*, 516 S.E.2d 858, 861 (N.C. 1999). This right to a jury trial has been found to be substantive, meaning that the denial of it may give rise to a substantive due process claim. *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 10 (N.C. 2004) (quoting *Kiser v. Kiser*, 385 S.E.2d 487, 489 (N.C. 1989)). As stated previously, Respondents' fundamental right to a jury trial has been repeatedly denied by Petitioners' through extensive appeals. It is respectfully submitted that Petitioners' denial of Respondents' fundamental right would be subjected to the strictest scrutiny by this Court. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). In order to overcome strict scrutiny review, the objective being pursued under the color of state law must be compelling, not just legitimate, and the means used to achieve this objective must be necessary. *Glucksberg*, 521 U.S. at 721. This Court has stated that there is a presumption that actions under state law, which affect fundamental rights, do not meet strict scrutiny judicial review, and as such, the burden is on the entity to show a compelling interest and narrowly tailored means. *Id.*

Petitioners' conduct of using repeated appeals to avoid a jury trial on the merits of Respondents' tort claim does not achieve a compelling interest. The North Carolina Court of Appeals and the North Carolina Supreme Court both found that Respondents' complaint sufficiently alleged constitutional claims; however, Petitioners continue spending

taxpayer money on further appeals, claiming that the complaint is insufficient. (Petr.'s App. 1-26.) These further appeals compound Respondents' denial of a jury trial, without furthering any compelling interest. Furthermore, it is important to note that the burden is on Petitioners to show a compelling state interest, and it is respectfully submitted that they cannot do so.

III. THE PETITIONS FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT FOUND, IN AFFIRMING THE COURT OF APPEALS, THAT RESPONDENTS' COMPLAINT RAISED GENUINE QUESTIONS AS TO WHETHER PETITIONERS' DISCRIMINATORY PRACTICE WAS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

As the Petitioners point out, "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination. . . ." *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Paragraphs 45-50 of Respondents' complaint specifically describe how Petitioners violated Respondents' equal protection rights by arbitrarily exercising their authority to defend and pay claims in a way that *intentionally and capriciously discriminates* against similarly situated people. (Petr.'s App. 97-98.) It is undisputed that Petitioners have a routine and habit of asserting immunity in some claims, but paying other claims where immunity could have been asserted without providing any guidelines or standards that they follow. (Petr.'s App. 107-08, 121.) In fact, as previously stated, Petitioners have no such uniform guidelines or standards. (*Ripellino I* R Ex. 10, 66.)

By exercising what they call "absolute discretion," Petitioners intentionally and arbitrarily treat some claimants differently than they treat others. In the past, Petitioners have paid other injured individuals for both their property and tort damages, whereas Petitioners only paid Respondents $2,153.18 for property damage, and then asserted immunity as to the tort damages. Petitioners gave no reasons for paying the property damages, but not the tort claim. (*Ripellino I* R Ex. 84-85.)

In paragraph 45 of their complaint, it is alleged that Respondents are similarly situated to other tort claimants who have requested a jury trial after their claim was denied by the Petitioners, under a theory of "absolute discretion." As stated in paragraphs 45-50 of Respondents' complaint, Petitioners have a custom or history of paying some claims but not paying others, and Respondents fall into the same category as these other claimants who were first denied compensation by the Petitioners without having their claim analyzed under uniform, published standards, and secondly were denied a jury trial. (Petr.'s App. 97-98.)

This Court has stated that for equal protection claims where the state's conduct "neither proceeds along suspect lines nor infringes upon fundamental constitutional rights," the conduct must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Comm., Inc.*, 508 U.S. 307, 313 (1993). Petitioners' conduct of exercising absolute discretion in defending and paying claims does not meet this test, and is not rationally related to a legitimate governmental interest. N.C. Gen. Stat. § 115C-43(c)(ii) specifically requires Petitioners to use published, uniform guidelines when evaluating payment of claims, and as such, it prohibits the

Board's exercise of "absolute discretion" in defending and paying claims. As previously stated, since Petitioners violate Section 115C-43(c)(ii) by having no such standards, it is respectfully submitted that Petitioners' conduct cannot be rationally related to a legitimate governmental interest. *Pennell v. City of San Jose*, 485 U.S. 1 (1988). If Petitioners' conduct is not even rationally related to a legitimate government interest, then there is no possibility that it meets the higher standard of strict scrutiny, which is applicable since Petitioners denied and continue to deny Respondents' fundamental right to a jury trial.

As such, it is respectfully submitted that Respondents' equal protection rights have been violated, which their complaint adequately alleges.

CONCLUSION

For these reasons, it is respectfully submitted that the Petitions for a Writ of Certiorari filed by Petitioners should be denied.

Respectfully submitted,

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